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No. 81-2371

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN C. AMIS, JR., PRESIDENT, AMEY & MONGE, INC.,
PETITIONER

v.

INTERNAL REVENUE SERVICE AND CHARLES O. DEWITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the decision below denying him attorney's fees and costs under the Freedom of Information Act (FOIA), 5 U.S.C. 552(a)(4)(E).[1] That decision is correct, and the result in this case does not conflict with the decision of any other court. Thus, there is no basis for further review by this Court.

Petitioner is the president of Amey & Monge, Inc. In January 1980, the secretary of Amey & Monge, Inc., wrote to the Internal Revenue Service requesting, under the FOIA

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[1]Section 552(a)(4)(E) of 5 U.S.C. provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

and the Privacy Act of 1974, 5 U.S.C. 552a, copies of "any and all records pertaining to Amey & Monge, Inc." (Pet. App. A-1). The IRS processed this request only under the FOIA, because the Privacy Act does not apply to corporations. The IRS released copies of 17 pages of documents, but withheld the other requested documents, citing exemptions to the FOIA provided under 5 U.S.C. 552(b)(3), (b)(7)(A) and (b)(7)(D). Those exemptions permit an agency to withhold documents in cases in which the documents are specifically exempted from disclosure by statute, or in which their release would interfere with ongoing enforcement proceedings or disclose the identity of a confidential informant (Pet. App. A-1 to A-2).

In October 1980, petitioner, acting pro se, filed a complaint in the United States District Court for the Middle District of Florida seeking production of the contested documents pursuant to the FOIA and the Privacy Act, as well as damages, attorney's fees and costs. Petitioner then filed a *Vaughn*[2] motion requesting detailed justification, itemization and indexing of the documents (Pet. App. A-2).

At a hearing held in January 1981, the government argued, *inter alia*, that petitioner had initiated the suit in order to obtain documents relating to an ongoing civil investigation of his tax liabilities (Pet. App. A-2). At the conclusion of the hearing, the district court ordered the IRS to file a *Vaughn* index within forty days (*ibid.*). On February 12, 1981, the IRS released all of the requested documents, explaining that the identity of the confidential informant whom the IRS had sought to protect had been revealed, so that there was no longer a need to withhold the documents (*ibid.*). Petitioner then filed a motion seeking

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[2] *Vaughn* v. *Rosen*, 484 F. 2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

attorney's fees in the amount of $6,057.50 and costs (*ibid.*). In April 1981 the district court denied petitioner's claim for attorney's fees and ordered each party to bear its own costs (*id.* at A-1 to A-2).

On March 30, 1982, the court of appeals affirmed in an unpublished per curiam opinion (Pet. App. A-1 to A-3). The court of appeals concluded that attorney's fees could not be awarded to a pro se litigant under the FOIA and, in addition, that petitioner had not "substantially prevailed" in his suit within the meaning of the FOIA (*id.* at A-3). The court noted that petitioner had never obtained a court order requiring disclosure of documents. Therefore, the court concluded that in order to meet the "substantially prevailed" standard under the FOIA petitioner would be required to show that his suit could reasonably be regarded as necessary to obtain the information and that the suit had had a substantial causative effect on delivery of the information (*id.* at A-3). The court concluded that it had been a change in circumstances, *i.e.*, revelation of the identity of a confidential informant, that had led to delivery of the information, rather than the institution of petitioner's suit. The court therefore concluded that the district court's decision that each party should bear its own costs was not an abuse of discretion (*ibid.*).

1. The court of appeals followed *Barrett* v. *Bureau of Customs*, 651 F. 2d 1087 (5th Cir. 1981), cert. denied, No. 81-5633 (Feb. 22, 1982), in holding that petitioner, as a pro se litigant, was not entitled to attorney's fees under the FOIA.[3] Petitioner cites no authority for the proposition that the FOIA authorizes payment of attorney's fees to pro

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[3] *Barrett* involved the attorney's fee provision of the Privacy Act of 1974, 5 U.S.C. 552a. However, the Fifth Circuit noted in *Barrett* that the attorney's fee provisions of the Privacy Act and of the Freedom of Information Act are virtually identical. 651 F. 2d at 1088.

se plaintiffs but merely argues that he should receive such fees because he allegedly has performed a public service (Pet. 7). The court of appeals' conclusion is consistent with that of the great majority of the circuits that have considered whether attorney's fees are available to pro se litigants under the FOIA and under other statutes with similar attorney's fee provisions.[4] These courts have correctly concluded that the language, legislative history, and purpose of the attorney's fee provisions of the FOIA and similar statutes indicate that Congress did not intend that fees be awarded to pro se litigants—any more than they authorize the awarding of hypothetical "fees" for attorneys who might reasonably have been, but were not, hired in addition to an attorney or attorneys actually utilized.

2. Even if petitioner were not a pro se litigant, he would not be eligible for an award of either attorney's fees or costs because he did not "substantially prevail" in his suit, as required under the terms of 5 U.S.C. 552(a)(4)(E). The

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[4]See *Crooker* v. *United States Department of Justice*, 632 F. 2d 916, 920-922 (1st Cir. 1980) (FOIA); *Cunningham* v. *FBI*, 664 F. 2d 383 (3d Cir. 1981) (FOIA); *White* v. *Arlen Realty & Development Corp.*, 614 F. 2d 387 (4th Cir.), cert. denied, 447 U.S. 923 (1980) (Truth in Lending Act, 15 U.S.C. 1640(a)(3)); *Davis* v. *Parratt*, 608 F. 2d 717 (8th Cir. 1979) (Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988); *Hannon* v. *Security National Bank*, 537 F. 2d 327 (9th Cir. 1976) (Truth in Lending Act); *Burke* v. *United States Department of Justice*, 559 F. 2d 1182 (10th Cir. 1977) (FOIA). But see *Cox* v. *United States Department of Justice*, 601 F. 2d 1, 5-6 (D.C. Cir. 1979) (FOIA); *Marschner* v. *Department of State*, 470 F. Supp. 196, 201 (D. Conn. 1979) (FOIA).

Petitioner cites *Clark* v. *American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), aff'd, 437 F. 2d 959 (5th Cir. 1971), for the proposition that courts have been willing to dispense with formal attorney-client requirements under attorney's fee statutes (Pet. 7). However, *Clark* did not involve a pro se litigant, but rather the question whether a litigant's fee arrangements with out-of-state lead counsel should affect the award of attorney's fees under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Thus *Clark* has no application to the present case.

court of appeals' conclusion that petitioner did not substantially prevail rests on a determination of fact that should not be reversed on appeal unless it is clearly erroneous. See *Chilivis* v. *SEC*, 673 F. 2d 1205, 1212 (11th Cir. 1982); *Ginter* v. *IRS*, 648 F. 2d 469, 471 (8th Cir. 1981); *Crooker* v. *United States Department of Treasury*, 663 F. 2d 140, 142 (D.C. Cir. 1980). Petitioner argues that he substantially prevailed because the government ultimately released all of the documents he had requested (Pet. 5). However, the attorney's fee provision of the FOIA was not intended to provide an automatic fee to any litigant simply because a suit was brought and the requested information was then furnished. See, *e.g.*, *Ginter* v. *IRS*, *supra*, 648 F. 2d at 470-471; *Cox* v. *United States Department of Justice*, 601 F. 2d 1, 6 (D.C. Cir. 1979); *Vermont Low Income Advocacy Council, Inc.* v. *Usery*, 546 F. 2d 509, 514 (2d Cir. 1976). A number of courts have held, as did the court of appeals here, that, in order to meet the "substantially prevailed" test in the absence of a favorable judgment, a FOIA litigant must show (1) that a suit could reasonably have been regarded as necessary; and (2) that the suit was a substantial causative factor in obtaining release of the information. See, *e.g.*, *Chilivis* v. *SEC*, *supra*, 673 F. 2d at 1212; *Fund for Constitutional Government* v. *National Archives and Records Service*, 656 F. 2d 856, 871 (D.C. Cir. 1981); *Ginter* v. *IRS*, *supra*, 648 F. 2d at 471; *Lovell* v. *Alderete*, 630 F. 2d 428, 432 (5th Cir. 1980); *Vermont Low Income Advocacy Council, Inc.* v. *Usery*, *supra*, 546 F. 2d at 513.

Petitioner did not obtain a court order for release of the documents, but only an order requiring the government to submit a *Vaughn* index so that the court could decide whether the IRS had properly withheld the documents. The court of appeals correctly concluded that the latter order was not sufficient to meet the "substantially prevailed" test (Pet. App. A-3). Moreover, as the court of appeals found,

the government voluntarily released the documents not because of petitioner's suit, but because of changed circumstances, *i.e.*, revelation of the identity of the confidential informant. Although the release of the documents occurred after the government had been ordered to file a *Vaughn* index, the timing was a coincidence, dictated by developments in other litigation involving petitioner and the IRS. Thus, petitioner's suit was not a substantial causative factor in the release of the documents. It follows that petitioner did not "substantially prevail" in his suit, and he may not recover attorney's fees or costs under the terms of the FOIA.[5]

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[5]Petitioner cites several district court decisions in support of his argument that he should be held to have substantially prevailed (Pet. 4-5). All are distinguishable from the present case. In three of the cases litigants were held to have substantially prevailed where the government apparently released the requested documents without explanation, or with an unacceptable explanation, soon after the plaintiff had filed an FOIA suit. See *American Federation of Government Employees* v. *Rosen*, 418 F. Supp. 205 (N.D. Ill. 1976); *Goldstein* v. *Levi*, 415 F. Supp. 303 (D.D.C. 1976); *Communist Party of the United States* v. *United States Department of Justice*, Civil No. 75-1770 (D.D.C. Mar. 23, 1976) slip op. 3-4. In contrast, here the government indicated a valid reason for the timing of release of the documents. In *Kaye* v. *Burns*, 411 F. Supp. 897 (S.D.N.Y. 1976), the court stated that release of documents prior to final judgment does not necessarily preclude a litigant from meeting the "substantially prevailed" requirement. *Id.* at 902. However, the court declined to award attorney's fees. It concluded that the Federal Reserve Board had reasonably withheld the requested document, which appeared to contain material exempt from disclosure under the FOIA. In addition, the court noted that the content of the document related to the subject matter of a federal grand jury investigation and suggested that this fact might have justified the Board's withholding of the document. *Id.* at 904 n.10. It also noted that plaintiff had brought his FOIA suit to further his own commercial interest, in particular his litigation with the company that was the subject of the document. *Id.* at 905. If anything, the court's denial of attorney's fees in *Kaye* v. *Burns* suggests that fees and costs were properly denied in the present case.

3. Petitioner's contentions (Pet. 6-7) with respect to whether the IRS had a reasonable basis in law for withholding the documents and whether his suit provided a public benefit are irrelevant to the question whether he substantially prevailed in his suit. These factors are considered by a court in the exercise of its discretion to award or deny attorney's fees only *after* it concludes that a litigant has substantially prevailed. See, *e.g., Stein* v. *Department of Justice*, 662 F. 2d 1245, 1262 (7th Cir. 1981); *Fund for Constitutional Government* v. *National Archives and Records Service, supra*, 656 F. 2d at 870-873; *Crooker* v. *United States Department of Justice*, 632 F. 2d 916, 922 (1st Cir. 1980). Because petitioner has not demonstrated that he substantially prevailed, there is no occasion for consideration of his additional contentions.[6]

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[6]In any event, it is clear that, even if petitioner had substantially prevailed, the considerations he mentions would not weigh in favor of an award of fees or costs. Petitioner's suit involved a solely private interest, relating to litigation between petitioner and the IRS. Compare *Chamberlain* v. *Kurtz*, 589 F. 2d 827, 842 (5th Cir.), cert. denied, 444 U.S. 842 (1979) (denying attorney's fees in part because documents were sought in connection with possible deficiency claim against litigant and thus served a personal and pecuniary interest). Despite petitioner's contention to the contrary (Pet. 7), no substantial public benefit resulted from release of the documents in question. Nor is there any basis for petitioner's claim (*id.* at 6) that the IRS lacked a reasonable basis in law to withhold the requested records. Petitioner has not shown that the IRS was incorrect in its conclusion that the requested documents were exempt from disclosure under the cited portions of the FOIA. Indeed, the record demonstrates instead that the government turned over the documents promptly upon learning that the identity of a confidential informant had been revealed, so that the primary justification for withholding the documents no longer existed (Pet. App. A-2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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